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No. 241

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

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JOHN TORPATS, *Petitioner*

v.

JOHN A. McCONE

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## PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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1. Petitioner has never contended at any juncture, after taking his cause to court, that he was entitled under the statute or the regulation to what respondent refers to as a "judicial-type hearing", nor that he was entitled to a "full dress hearing with confrontation of witnesses, specifications of charges, counsel and cross-examination." Petitioner affirmatively disclaimed any such contention in his Reply Brief in the Court of Appeals (pp. 2-3). He has contended, and still does,

only that, under Section 102(c) of the National Security Act and the Agency's Regulation 20-700, he was entitled to a "thorough and impartial review of all pertinent information favorable and unfavorable" to him before his separation could be effected legally. He contends that under the due process clause of the Constitution he had a right to know what the unfavorable information was and a right to be heard in his own behalf to refute the unfavorable and to give the favorable information before the Director could make a valid determination that his separation was "necessary and advisable in the interests of the United States".

Respondent says (p. 7) that petitioner "availed himself of the opportunity for interviews with high Agency officials". These are not apt words to describe petitioner's unsuccessful attempts to have somebody in authority in the Agency consider his case on the merits. The frustration of his purpose is described in detail in his affidavit (Record Appendix, 36-43).

2. a. While petitioner's complaint does allege that an "Employment Review Board" was appointed in 1956 and again in 1958, petitioner did not allege, in terms, that such a Board was appointed in 1960. He alleged in his complaint that he was told that he was to have a hearing under CIA Regulation 20-700, (Record Appendix, 6) and averred in his affidavit that he interpreted the promise of a hearing to be one before an Employment Review Board. (Record Appendix, 39). Respondent concedes that petitioner was "offered a hearing" and that one was convened (p. 5). Whether it was or was not an "Employment Review Board" appointed by the Director is not material. A hearing board, by whatever name it be called, was appointed

by somebody. Petitioner averred that it was not an "impartial" board in that it was composed of only two men, both of whom had recommended earlier that petitioner be separated (Record Appendix 39).

b. The principal material question of fact in this case is whether respondent's predecessor "personally reviewed the employment record" of petitioner and "thoroughly reviewed the case", as required by Regulation 20-700, i.e., did the man with the statutory authority, the Director, make a "thorough and impartial review of all pertinent information favorable and unfavorable" to petitioner. If he did not; he did not follow his own Regulation and under *Service* v. *Dulles*, 354 U.S. 363 and *Watson* v. *United States*, 355 U.S. 14, and 162 F. Supp. 755 (Ct. Cls. 1958), petitioner would be entitled to reinstatement. Respondent swears that he did review; petitioner swears that he did not. Petitioner's averments should have been taken as true on respondent's motion for summary judgment and the motion denied. If there be a genuine issue (as here) as to a material fact (as here) a motion for summary judgment must be denied. (Rule 56(c) Fed. R. Civ. P.; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 627).

Respondent argues that "the review requirement" is not an issue because of "a presumption of validity which attaches to the formal recitations of public officials". It is a rebuttable one. The truth of the particular and general averments in respondent's affidavit has been attacked directly by petitioner in his affidavit on file. More than that, respondent's predecessor swore to a succession of statements in his first affidavit (Record Appendix 18-21). He, later, on his oath, retracted a material part of his first affidavit as

untrue and casually told the court that: "I will now set forth the correct version of the affidavit." (Record Appendix 18-19).

In the words of the case cited and quoted by respondent, there is a good deal more here than "a mere allegation in a brief" or an "affidavit on information and belief" to "upset the presumption of validity attaching to * * * the formal recitations" of this former public official.

The affiant himself has impeached "the veracity of his sworn statement";

The conclusion seems inescapable that respondent's predecessor signed an affidavit, which he did not prepare, without first determining whether all of the statements in it were true.

His sworn statements have been attacked by petitioner, under oath as a participant in the proceedings.

## CONCLUSION

Since there was a genuine issue as to a material fact ("the review requirement"), certiorari should be granted and the case returned to the trial court for further proceedings.

Respectfully submitted,

BYRON N. SCOTT
*Attorney for Petitioner*